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IN THE

Supreme Court of the United States

October Term, 1983

JEAN P. WHITE,

Petitioner,

v.

SALLY A. WHITE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Did the complaint in the federal district court plead a federal question?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, JEAN P. WHITE, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings on April 18, 1983.

OPINIONS BELOW

The opinion of the District Court for the Southern District of California appears at Appendix A. The opinion of the Court of Appeals for the Ninth Circuit appears at Appendix B.

JURISDICTION

The order or judgment of the Court of Appeals for the Ninth Circuit was entered on April 18, 1983. See Appendix B. This petition for certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Clauses 13 and 14:

> (13) NAVY. To provide and maintain a Navy.
>
> (14) GOVERNMENT AND REGULATION OF LAND AND NAVAL FORCES. To make Rules for the Government and Regulation of the land and Naval Forces.

Constitution of the United States, Article III, Section 2:

> "The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

Constitution of the United States, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

On November 23, 1981, petitioner JEAN P. WHITE filed a complaint for declaratory relief and a motion for preliminary injunction. The

complaint referenced Title 28 U.S.C., Section 1331, as a basis for federal jurisdiction. The referenced statute - the so-called federal question statute - gives to the federal district courts original jurisdiction of all civil actions that arise under the Constitution laws or treaties of the United States wherein the matter in controversy exceeds the sum or value of $10,000.00. The complaint set out that the federal question it presented had its basis in three clauses of the Constitution of the United States, Title 10 of the United States Code, and the United States Supreme Court decision of *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589. The referenced clauses of the Constitution were as follows: Article VI, Cl. 2 (Supremacy Clause), Article I, Section 8, Cls. 12, 13, and 14, which in pertinent part empower Congress "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and Naval Forces," and the equal protection clause of the Fourteenth Amendment.

The complaint went on to allege that an interlocutory judgment of dissolution of marriage had been entered previously between the petitioner and respondent on January 2, 1975, in the Superior Court of San Diego County, State of California. Further, that a portion of the judgment purported to award the respondent 21% of the military retired pay of petitioner. Petitioner had been on active duty in the United States Marine Corps for thirty years before March of 1975.

Petitioner further alleged that on September 10, 1981, respondent had pursued him in the California courts by an order to show cause and delcaration for contempt and that rather than stand exposed to jail and fines he had entered into an interim agreement to stay current in his payments of his military retired pay to respondent.

Petitioner sought a judgment that no person other than he have any interest in his military retired pay and further that respondent be restrained and enjoined from taking any action whatsoever to collect any interest in his military retired pay. A motion for preliminary injunction filed simultaneously with the complaint for declaratory relief essentially asked that respondent be restrained from pursuing petitioner in the courts of California pending the outcome of the federal case.

Respondent by her answer filed January 6, 1982, generally denied the allegations of the complaint. She further on that date moved to dismiss and/or remand the case to the state courts.

When the matter came to hearing on January 18, 1982, before the Honorable Edward J. Schwartz, there was no dispute that the legal history between these parties was as set out in the complaint. The court on that date first denied the motion of respondent to remand the case since the case had not been removed from state court. The court then made various findings with regard to the motion for a preliminary injunction and then denied that motion. Petitioner does not press on appeal the issue of the denial of the motion for preliminary injunction but rather focuses solely upon the motion to dismiss granted by the District Court. With regard to that motion, the court found that the cause of action brought by petitioner did not involve a claim under federal, but rather state law, and dismissed the complaint. The order filed May 5, 1982, incorporates the particulars of the oral decision rendered at the time of the hearing.

On February 25, 1983, an appeal was filed in the United States Court of Appeals for the Ninth Circuit. On April 18, 1983, the Court of Appeals held that the trial court did not abuse its discretion in denying jurisdiction and affirmed the District Court's decision.

REASONS FOR GRANTING THE WRIT

The case of *McCarty v. McCarty* (1981) 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728, held that federal law pre-empts the application of state laws which purport to divide military retired pay as community property in the context of a dissolution of marriage proceeding. The issue arguably left open by *McCarty* is whether or not its holding has any effect on prior state cases which divided military retired pay. The issue is sometimes described as one of "retroactivity," although it is more accurately described as one of prospective application in the sense that the petitioner under the prior state court judgment has an ongoing obligation to divide his military retired pay. He needs a determination of whether or not the prior state judgment is valid to require such an ongoing division.

The effect of *McCarty* upon prior state cases is a substantial legal issue for the laws of a state which violate the Supremacy Clause of the Constitution of the United States are void and of no force or effect. In *McCulloch v. Maryland* (1819) 4 Wheat. 316, Chief Justice Marshall construed the Supremacy Clause as the bulwark of national power it has since remained, when he declared:

> "The states have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government." 4 Wheat. at 463.

Gibbons v. Ogden (1824) 9 Wheat. 1, 6 L.Ed. 23, also proclaims the nullity of any Act inconsistent with the Constitution. If a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim to validity even though the state action in question was taken within a sphere in which the states could otherwise act. *Free v. Bland* (1962) 369 U.S. 663, 8 L.Ed.2d 180, at 369 U.S. 666; *Franklin Nat. Bank v. New York* (1954) 347 U.S. 373, 379, 98 L.Ed. 767, 774, 74 S.Ct. 550.

Perhaps the latest demonstration of the power of the doctrine of federal pre-emption is *Ridgway v. Ridgway* (1981) 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39, wherein this Court swept away an earlier injunction by a state court that required a service member to retain a Servicemen's Group Life Insurance policy in effect on his life for the benefit of his three children. The *Ridgway* court quoted from *United States v. Yazell* (1966) 382 U.S. 341, 352, when it held:

> "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, where the Framers of our Constitution provided that the federal law must prevail."

The effect of the *McCarty* decision on prior state cases is not only substantial but it is exclusively *federal*. The effect to which a federal court must attach conclusive effect to prior state court proceedings is a federal question. *Adam v. Sanger* (1938) 303 U.S. 59, 64, 58 S.Ct. 454, 82 L.Ed. 649. This Court, by the *McCarty* decision, has held that the subject area of the complaint filed by the petitioner in this case is controlled by federal law. Even the District Court in this case agreed on the record that the "retroactivity" or "non-retroactivity" of the *McCarty* decision would ultimately have to be decided by this Court. What has happened since the *McCarty* decision, instead, is that state courts have attempted to apply federal principles to determine the effect of the *McCarty* decision. For example, in *In Re Marriage of Sheldon* (1981) 124 Cal.App.3d 371, 177 Cal.Rptr. 380, a California Court of Appeal provides an extended analysis of the case of *Chevron Oil Co. v. Huson*

(1971) 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296. The state court tries to glean from federal decisions what would be the federal rule on retroactivity. Until this Court rules on that issue, litigants of necessity must remain in doubt about the effect of *McCarty*.

At this point, this case presents the issue of whether the complaint prevents a substantial dispute over the effect of federal law. *Spokane County Legal Services, Inc. v. Legal Services Corp.* (1980) 614 F.2d 662, 667; *Standage Ventures, Inc. v. Arizona* (1974) 499 F.2d 248, 249. Since this Court has ruled definitively in *McCarty* that the subject area of the complaint is not ony substantially, but exclusively, a federal question, that would seem to end the inquiry; however, the Circuit Court of Appeals in its memorandum decision held that the suit of petitioner was properly dismissed for failure to state a federal claim. It said further that the question of retroactive application of *McCarty* was "defensive to future contempt proceedings initiated in state court by appellant's ex-wife" and that federal jurisdiction could not be created by anticipating defenses in the complaint. Cited by the Circuit Court was *Louisville & Nashville R.R. Co. v. Mottley* (1908) 211 U.S. 149, 152. The problem with this analysis is that the lawsuit did not "create" federal jurisdiction by anticipating "defenses" in the complaint: the complaint spelled out the federal question and pointed to a real controversy between the parties.

Article III, Section 2 of the United States Constitution provides that the federal courts may be given jurisdiction over "cases common in law and equity, arising under this Constitution, the law of the United States and treaties made, or which shall be made, under their authority." *Gully v. First National Bank* (1936) 299 U.S. 109, points out that "to bring a case within the statute a right or immunity created by the Constitution or laws of the United States must be an element and an essential one of the plaintiff's cause of action." *Gully, supra*, at 112. The case further states, at 112, "the right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."

The right of petitioner to relief depends upon the construction or application of the laws of the United States and decisions of this Court and for that reason arises "directly" under those laws and decisions. The military retired pay of petitioner was established by, controlled by, and can only be amended by, federal law.

This Court has on many previous occasions considered conflicts between federal law and state community property laws and each time resolved the conflict in favor of federal preemption. *Yiatchos v. Yiatchos* (1964) 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724; *Wissner v. Wissner* (1950) 338 U.S. 655, 94 L.Ed. 424; *Free v. Bland, supra; McCune v. Essig* (1905) 199 U.S. 382, 26 S.Ct. 78, 50 L.Ed. 237; *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572. The Court on issues that range from U.S. Savings Bonds survivorship provisions (*Yiatchos*) to Railroad Retirement Act benefits (*Hisquierdo*) has held that federal law controls.

The scale of litigation on the *McCarty* issue in California alone since that decision is some indication of the interest in this issue. *In Re Marriage of Sheldon, supra; In Re Marriage of Mahone* (1981) 123 Cal.App.3d 17, 176 Cal.Rptr. 274; *In Re Marriage of Fellers* (1981) 125 Cal.App.3d 254, 178 Cal.Rptr. 35. California, from 1974 on, inaccurately determined that federal pre-emption did not prevent its state courts from dividing military retired pay as community property. *In Re Marriage of Fithian* (1974) 10 Cal.App.3d 592. Military retirees who had their retired pay divided during the years 1974 to 1981 need a determination of the federal question as to the validity of those judgments.

Passage of the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) 10 U.S.C., Section 1408, does not moot the issue. Any application of that Act that would affect the admittedly vested rights of petitioner in and to his military retired pay would present serious constitutional problems. That is an issue not presented by this case in any event.

Petitioner requests that this Court delay its ruling on the instant petition to ascertain if similar petitions will be filed with this Court in three similar cases that now pend in the Ninth Circuit Court of Appeals. The cases are *Armstrong v. Armstrong*, No. 82-5518, decided January 18, 1983, now the subject of a petition for rehearing in that Court, *Fern v. Turman*, No. 82-4577, and *Stirm v. Adams*, No. 82-4581, each on appeal to the Ninth Circuit Court of Appeals from the United States District Court for the Northern District of California. Each of the referenced cases presents the issue of whether the question of retroactivity of the *McCarty* decision can be pleaded in a federal district court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: July 15, 1983.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JEAN P. WHITE,

Plaintiff,

vs.

SALLY A. WHITE,

Defendant.

CIVIL ACTION NO. 81-1169-S(M)

ORDER ON CROSS-MOTIONS FOR PRELIMINARY INJUNCTION AND DISMISSAL OF COMPLAINT

The Motion of plaintiff, JEAN P. WHITE, for a preliminary injunction and the Motion of defendant, SALLY A. WHITE, to dismiss the Complaint and/or to Remand having come on regularly for hearing on Monday, January 18, 1982, at 10:30 a.m., in the above-entitled Court, the HONORABLE EDWARD J. SCHWARTZ, Judge presiding, plaintiff appearing in person and by his attorney, JOHN KNOLL, and defendant appearing in person and by her attorney, ROBERT A. BOWLER, the Court having considered the file herein and heard argument of counsel:

1. THE COURT DENIES the Motion of defendant to remand this case since the case has not been removed from State Court.

With regard to the Motio of plaintiff for a preliminary injunction, the Court finds and orders as follows:

2. THE COURT CANNOT FIND that plaintiff has a probability of ultimate success.

3. THE COURT FINDS that plaintiff has not shown that irreparable harm or injury would result to him unless a preliminary injunction were issued but only that financial hardship might occur.

4. THE COURT FINDS that a serious question may be raised but the balance of hardships does not tip sharply in favor of plaintiff.

5. THE COURT CONCLUDES, in accordance with the above, that there is no basis for granting a preliminary injunction and the Motion for same is denied.

With regard to the Motion to dismiss brought by defendant the Court finds and orders as follows:

6. THE COURT FINDS that the cause of action brought by plaintiff does not involve a claim under Federal, but rather State law, and FOR FURTHER GOOD CAUSE as stated with particularity in the oral decision rendered following said hearing, the COURT ORDERS the Complaint dismissed.

APPROVED AS TO FORM:

DATED: APRIL 27, 1982

ROBERT A. BOWLER
Attorney for Defendant

O-R-D-E-R

IT IS SO ORDERED.

DATED: MAY 4, 1982

EDWARD J. SCHWARTZ
UNITED STATES DISTRICT
COURT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEAN P. WHITE,

Plaintiff-Appellant,

v.

SALLY A. WHITE,

Defendant-Appellee.

No. 82-5522
D.C. # CV 81-1169

MEMORANDUM

Appeal from the United States District Court
for the Southern District of California
Edward J. Schwartz, District Judge, Presiding
Argued and submitted April 5, 1983

Before: GOODWIN, TANG and FLETCHER, Circuit Judges.

Mr. White's suit was properly dismissed for failure to state a federal claim. The question of retroactive application of *McCarty v. McCarty*, 101 S.Ct. 2728 (1981) is defensive to future contempt proceedings initiated in state court by appellant's ex-wife. Federal jurisdiction cannot be created by anticipating defenses in the complaint. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). A grant of jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, is discretionary. The trial court did not abuse its discretion in denying jurisdiction.

AFFIRMED.